ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
E-SAT, INC.	)	File No. RM - _____
	)	
Petition for Rulemaking to Establish Rules for Licensing Second-Round Applicants in the Non-Voice, Non-Geostationary Mobile Satellite Service	)	

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To: The Commission

Comments of Final Analysis

Final Analysis Communication Services, Inc. ("Final Analysis"), by its attorneys, hereby submits its "Comments" to the "Motion to Dismiss" filed by Leo One USA Corp. ("Leo One") on February 26, 1996 in the above-captioned proceeding.[1] As set forth below, Final Analysis supports E-SAT's Petition for Rulemaking in order to resolve the issues confronting both first-round licensees and second-round applicants in the NVNG MSS Below 1 GHz. Leo One's attempt to seek dismissal of the petition is ill-considered and inexplicable. Final Analysis further urges the Commission to adopt rules and policies that will lead to robust marketplace competition in the Little LEO industry, while strengthening United States leadership position in this dynamic new mobile satellite service.

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[1] Final Analysis is an applicant in the second NVNG MSS processing round, and therefore possesses the requisite standing to file these Comments.

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DISCUSSION

I. The Need For A Rulemaking is Abundantly Clear In The Aftermath Of The February 28, 1996 Status Conference

In the course of the February 28, 1996 Status Conference, the Commission made clear that the legal and policy issues associated with the current Little LEO round simply cannot be made to fit the existing processing rules in this service. Existing issues include, but are not limited to: (i) the question of first round licensee participation in the second round; (ii) the issue of allowing GE Americom to purchase a controlling interest in Starsys, while continuing to pursue its application in the second round; (iii) the handling of license modification requests such as the request made by Orbcomm that may affect the quantity and utility of spectrum available for the second round; (iv) the treatment of newly-allocated spectrum from WRC-95; and (v) the question of whether existing Little LEO companies will be given preferential treatment in the licensing of additional spectrum that may be obtained at WRC-97.

In addition, there are critical spectrum issues that must be resolved before the processing of applications can realistically go forward. There are uncertainties about sharing with Government users in the 137-138 MHz band; questions about the availability of spectrum in the 400.15-401 MHz band; and issues relating to the difficulties in coordinating with other satellite systems.[2] It is simply unknown what usable spectrum is currently available.

[2]For example, according to Orbcomm, its most recent license modification, involving changes to its channelization, was prompted in part by the need to avoid conflicts with the Russian Meteor satellite system.

In light of these difficult and complex issues, it is abundantly clear that a rulemaking, and careful consideration of the competing issues in a public forum, is now necessary. This is the case whether it stems from E-SAT's efforts or if it is reframed as the Commission's own initiative. Such a regulatory approach is not simply the best way to address these challenges, it is the only workable way -- and that should be evident to all concerned at this point. Accordingly, Leo One's attack on the concept of a rulemaking in this proceeding is puzzling, to say the least.[3]

II. Initiating A Rulemaking Will Not Be Unfair To Leo One

Leo One asserts that any delay in processing the second round applications will be unfair to "qualified" applicants, because it will allow "unqualified" applicants to "continue to complicate" the Commission's consideration of the second round.[4] Leo One calls upon the Commission to enforce its existing basic qualification rules to eliminate "unqualified" applicants and only then resolve the remaining issues. However, Leo One's confidence in its own ability to survive Commission scrutiny under the present rules is unfounded. Leo One's position simply cannot be explained based on the public record before the Commission.

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[3]Leo One's attempt to dismiss E-SAT's Petition on the basis that it does not comply with the rules is without merit. Leo One's feeble protestation that E-SAT does not provide the "text or substance" of any proposed rules is not entitled to serious consideration. In fact, what E-SAT has helped to do is identify and crystallize the key issues bearing on the second round in a helpful manner, and offered a creative and realistic approach to resolving them.

[4]We note that Leo One did not have the same concerns for expedited treatment of little Leo applicants when it made frivolous filings against VITA concerning the construction of its satellite. This action has caused VITA to charge Leo One with abuse of process and call for an investigation of Leo One's actions. See VITA "Opposition and Request for Investigation," FCC File No. CSS-91-007(3), submitted November 9, 1994.

In terms of basic qualifications, Leo One is the weakest applicant in the round. As has been fully detailed in previous filings, Leo One's financial showing is an elaborate maze of subterfuge, culminating in a "proprietary trust" whose contents are concealed from Commission review. The accounting firm which "reviewed" the trust assets never conducted an audit according to generally accepted accounting principles, and stated in no uncertain terms that "we do not express an opinion on the financial statements of the DAB Trust."[5] Leo One's ownership structure, and even the name and legal character of the entity which owns the license are questionable and veiled in secrecy.[6]

Moreover, Leo One has no technical capabilities of its own regarding the design, construction and launch of spacecraft. As Leo One admits in its Motion, it "began to design its . . . system in 1992,:"[7] approximately four years ago. Its initial application was filed a year later, in October, 1993. Leo One's initial technical proposal called for highly sophisticated interlink capabilities. This proposal was completely unrealistic and has since been totally redesigned several times -- and despite numerous technical amendments (and so-called "Errata") it is still not workable.

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[5] April 1, 1994 Letter of KPMG Peat Marwick, included with Leo One's application. The rules governing the assets in the DAB trust (and the unspecified "other" trusts which were "reviewed" by the accounting firm in order to establish Leo One's financial qualification) were *never* disclosed to the Commission, nor was any Trust Indenture submitted for review. Accordingly, the Commission simply has no way of knowing whether or not David Bayer has the real, unfettered ability to utilize the various trust contents for Leo One's proposed project. This arcane and elliptical showing hardly demonstrates Leo One's dominance in the second round. Leo One still has not made available the necessary financial information, despite repeated challenges from other applicants.

[6] See "Petition to Dismiss or Deny" filed by Final Analysis on November 16, 1994. Leo One has never responded to the numerous questions concerning its use of the secretive trusts to demonstrate financial qualification, calling into question real party in interest issues. Indeed, as aptly pointed out by CTA in its November 16, 1994 "Opposition to Application of Leo One USA and Request for Dismissal," quoting *FCC v. WOKO, Inc.*, 329 U.S. 223 at 227 (1946), " The fact of concealment may be more significant than the facts concealed."

[7] Leo One Motion to Dismiss at 2.

In addition, and as pointed out by several parties to the proceeding, Leo One grossly understated the costs associated with the design, construction and operation of its satellites, making it financially unqualified even if it is given full credit by the Commission for the amounts claimed in the clandestine trusts. Leo One's estimate of approximately $8 Million to build, launch and operate its first two satellites is glaringly insufficient -- especially when it is understood that Leo One has no in-house technical capability to design, build or launch a satellite constellation, and must "contract out" for even the most basic aspects of its technical proposal. This extra layer of cost structure makes it simply impossible for Leo One to execute its technical plan.[8]

Most significantly, the real world has in fact demonstrated the accuracy of the challenges to Leo One's cost projections -- and hence its financial qualifications. Although Leo One originally proposed an ambitious experimental satellite program as a major part of its initial application, a search of Commission records shows that Leo One has since surreptitiously abandoned the entire program without offering any explanation.

The facts on record, far from establishing Leo One as one of the "qualified" applicants it purports to be, indicate that Leo One is precisely the type of satellite applicant *most* detrimental to the Commission's prime mission of facilitating the provision of service to the public. As the Commission has previously stated:

> The purpose of both our financial and technical requirements for the NVNG service is to ensure that we grant licenses only to those who can expeditiously implement systems that will serve the public interest, convenience and necessity.

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[8]The only entity ever mentioned as building a satellite for Leo One was Defense Systems, Inc. ("DSI"), later bought by CTA. It should be noted that CTA projected a cost of over $15 Million for the construction, launch and operation of its own two initial NVNG satellites.

VITA Authorization Order, at n.14.[9] In contrast, Leo One is a "paper applicant" with no demonstrable financial resources or technical capability to provide this sophisticated, expensive service to the public. Accordingly, if the Commission eliminates applicants by the strict application of its existing processing rules, Leo One's application would be the very first to be discarded.

III. A Rulemaking Will Not Hamper The U.S. Effort At WRC-97

Leo One also contends that any delay in the Commission's processing of the second round applications will hinder the U.S. in its efforts to obtain more spectrum at WRC-97. Final Analysis acknowledges the importance of international partnerships to bolster the U.S. position in Geneva. However, existing second round processing questions have not deterred Final Analysis in its partnership with Russia's Polyot. Other significant international relationships are currently being built by Final Analysis[10] and other second-round applicants.

Nothing is stopping Leo One from building a network of international supporters.[11] What Leo One is really saying is that *it cannot, or does not want to,* take the commercial and financial risks associated with building international networks of affiliates and partners unless it has a license in its pocket. That, however, is a business

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[9] *In the Matter of the Application of Volunteers in Technical Assistance*, 78 RR 2d 1632 (1995).

[10] As Final Analysis has previously reported to the Commission in a letter to Scott Blake Harris dated December 19, 1995, Poland, Mongolia and Germany have applied to work with Final Analysis on aspects of the international experimentation associated with FAISAT-2v.

[11] Indeed, Leo One *already has* at least one international partner -- Leo One Panamericana of Mexico. The precise relationship of Leo One USA to Leo One Panamericana, and whether there is a foreign ownership violation remains one of the unsolved mysteries of this proceeding. Leo One has never provided a satisfactory answer to the questions raised by CTA in earlier pleadings concerning foreign ownership, and the bizarre and undisclosed trust used by Leo One in its application to demonstrate financial qualification make this inquiry even more important.

decision on Leo One's part and should not drive the Commission's decisionmaking in this proceeding.

Moreover, a rulemaking will clarify several critical issues regarding spectrum usage and should benefit the Little LEO industry in gaining support for U.S. positions and reaching international agreements. One issue that could be considered in a Rulemaking proceeding is the possibility of "partial" licensing for a number of smaller systems pending the outcome of WRC-97. Under such a scenario, the number of actual licensees would be greater and could further enhance the ability of the Little LEO industry in general to develop international relationships.

IV. The Commission Should Move Forward In An Expedited Manner To Address The Issues Identified In E-SAT s Petition

Final Analysis urges the Commission to take prompt action to commence the process of addressing and dealing with the issues identified in the E-SAT Petition and at the February 28, 1996 Status Conference. Final Analysis' recommends the following steps as a progressive and constructive way forward.

First, the E-SAT Petition should be placed on public notice as soon as practicable for comment by interested parties, so that appropriate regulatory measures can be fashioned. Absent this, the Commission, should initiate its own rulemaking, using it as a vehicle to adopt appropriate rules that can address the unique situation presented by processing the second round.

Second, the Commission should immediately freeze the filing of any new technical amendments to applications and applications for modifications of license in the

proceeding pending a determination of second round processing procedures in the context of the rulemaking proceeding.

Third, the Commission should invoke its authority under 47 C.F.R. § 25.142(b)(3) of the Rules[12] to direct existing licensees and applicants to attempt coordination of their systems in a cooperative fashion, convening negotiations and work sessions to determine what possibilities exist for a settlement of potential conflicts. The goal of these proceedings should be to develop specific "Spectrum Models" that could work if adjustments are made to the current spectrum proposals now before the Commission. Issues regarding future allocations should also be evaluated.

Fourth, the Commission should actively engage NTIA in appropriate dialogue concerning the existing allocations in the 137-138 MHz band and 400.15-401 MHz bands shared with Government users to determine the usable spectrum that could be offered to second round applicants. The Commission should make this information available to the Little LEO companies taking part in the above meetings.

Fifth, the Commission should confirm its commitment to leading the effort for acquiring additional spectrum for Little LEO systems at WRC-97 and should establish rules and policies that will lead to a unified effort by the Little LEO industry before the international community.

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[12] 47 C.F.R. § 25.142(b)(3) states, in pertinent part:

> All affected applicants, permittees, and licensees shall, at the direction of the Commission, cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum ...

In sum, Final Analysis urges the Commission to exercise its authority in a strong and positive manner. At stake is United States leadership in the future of an extremely valuable, global industry. Rules and policies should be fashioned to enable those Little LEO companies that are ready and able to provide service to the public to compete in the marketplace.

CONCLUSION

In view of the foregoing, the Commission should move to rulemaking in an expeditious fashion.

Respectfully submitted,

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Dated: March 12, 1996

Certificate of Service

I, Ronald J. Jarvis, an attorney in the law firm of Catalano & Jarvis, P.C., hereby certify that on this 12th day of March, 1996, I caused a true and complete photocopy of the foregoing "Comments" to be sent, via U.S. first class mail, postage prepaid, to the following:

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